PUBLIC REDACTED VERSION–
COMPLETE VERSION FILED UNDER SEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC RECORDING CORPORATION; ARISTA MUSIC, fka BMG MUSIC; CAPITOL RECORDS LLC fka CAPITOL RECORDS, INC.; ELEKTRA ENTERTAINMENT GROUP INC.; INTERSCOPE RECORDS; LAFACE RECORDS LLC; MOTOWN RECORD COMPANY, L.P.; PRIORITY RECORDS LLC; SONY MUSIC ENTERTAINMENT, fka SONY BMG MUSIC ENTERTAINMENT; UMG RECORDINGS, INC.; VIRGIN RECORDS AMERICA, INC.; and WARNER BROS. RECORDS INC., Plaintiffs, v. LIME WIRE LLC; LIME GROUP LLC; MARK GORTON; and M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP, Defendants.	06 Civ. 05936 (KMW) ECF CASE

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO DISQUALIFY WILLKIE FARR & GALLAGHER LLP AS COUNSEL FOR DEFENDANTS

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I. INTRODUCTION

The undisputed facts mandate that Willkie be disqualified from representing Defendants. At Cravath, Korn did not just receive some confidential information in passing, but lived and breathed Plaintiffs' confidential information for many months. At Willkie, Korn is not an anonymous associate in the firm's Brussels office, but has worked and continues to work [redacted] in New York with the Willkie attorneys leading the charge against Plaintiffs.

Plaintiffs do not advocate a *per se* rule against screens, as Defendants falsely suggest. As *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127 (2d. Cir. 2005), made clear, screens can only rebut the presumption of shared confidences "*in appropriate cases and on convincing facts*." *Id*. at 138 (emphasis added). Under these *facts*, where Korn was intimately involved as counsel for the other side in *the same case* that Willkie is now litigating, [redacted], Willkie's screen could not be sufficient. [redacted]

Defendants, as predicted, complain that having to comply with the ethics rules will upset their trial preparation plans. Defendants, unlike Plaintiffs, were fully apprised by Willkie of the conflict issue at the inception of this case, and they made a knowing, calculated decision to accept the risk of disqualification—as well as a knowing, calculated decision *not to inform Plaintiffs* about it. The law does not require *Plaintiffs* now to suffer the risk that their confidential information could be used against them. Willkie must be disqualified.

II. DEFENDANTS MISSTATE THE CONTROLLING STANDARDS

Defendants, not Plaintiffs, misstate the standards that control this motion.

First, Defendants repeatedly say that Plaintiffs have to show that "absent disqualification, the trial ***would be*** tainted." Opp. at 2 (quoting *Intelli-Check, Inc. v. Tricom Card Tech., Inc.*, 2008 WL 4682433, at *3 (E.D.N.Y. Oct. 21, 2008)); *see id.* at 4. That is *not* Plaintiffs' burden. The Second Circuit test is whether the conflict "poses a *significant risk* of trial taint," *not* that the trial *would* be tainted. *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 748 (2d Cir. 1981) (emphasis added).[1] *See Hempstead Video*, 409 F.3d 127 at 133 ("One recognized form of taint arises when an attorney places himself in a position *where he could use* a client's privileged information against that client.") (emphasis added); *Fierro v. Gallucci*, 2007 WL 4287707, at *8 n.3 (E.D.N.Y. Dec. 4, 2007) (disqualification mandated where "facts raise the specter that this litigation *could be* tainted") (emphasis added).

Second, Defendants' refrain that *Hempstead Video* says there is no "categorical" rule against screening, Opp. at 2, 11, 22, 23, is a straw man. Plaintiffs never suggested otherwise. *Hempstead Video* affirms that screens can only rebut the presumption "*in appropriate cases and on convincing facts*." *Hempstead Video*, 409 F.3d at 138 (emphasis added). Circuit authority, which *Hempstead Video* acknowledges approvingly, says that where there is "too high a risk of inadvertent disclosure of confidences," a screen may not "be effective." *Id.* (citing *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), *vacated on other grounds,* 450 U.S. 903 (1981)). Moreover, while Defendants never acknowledge it, *they* have the burden of showing that the screen they tout rebuts the presumption of shared confidences. *See Filippi v. Elmont Union Free School Dist. Bd. of Educ.*, 722 F. Supp. 2d 295, 315 (E.D.N.Y. 2010). Defendants fail to meet that burden. The undisputed facts here show that a screen could not be and was not effective:

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[1] While the Opposition chants "trial taint" as a mantra, Defendants never tell the Court what that standard means. It does *not* mean that Plaintiffs have to show a risk that Korn will participate in the trial or pass notes to counsel's table. It instead refers to the prospect that Korn's second firm (Willkie) "*might benefit* a client [the *Lime Wire* Defendants] *in a lawsuit* by using confidential information about an adverse party obtained through prior representation of that party." *Glueck* 653 F.2d at 748 (emphasis added).

(1) Korn was intimately involved as counsel for the other side in *the same case* that Willkie is now litigating, including on issues that will be front and center in the upcoming trial;[2] (2) [redacted] and (3) [redacted]

Third, Willkie's claims of good faith do not suffice. In a successive representation case, "misconduct need not be egregious: there need not be intent, bad faith, *or even actual disclosure of confidential information. Conduct that merely suggests that one side might enjoy the disclosure of confidential information may warrant disqualification.*" *Best Western Int'l v. CSI Int'l Co.*, 1995 WL 505565, at *2 (S.D.N.Y. Aug. 25, 1995) (emphasis added).

Fourth, and perhaps most important, "*any doubt is to be resolved in favor of disqualification.*" *Id.* (emphasis added). "The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case." *Fierro*, 2007 WL 4287707, at *8 (quoting *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973)). Defendants simply ignore this standard.

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[2] Courts have found this fact alone renders screens ineffective. *See Papyrus Technology Corp. v. New York Stock Exchange, Inc.*, 325 F. Supp. 2d 270, 279 (S.D.N.Y. 2004); *Kassis v. Teacher's Ins. & Annuity Ass'n*, 93 N.Y.2d 611, 618-19 (1999) (same). Defendants are wrong that these cases conflict with *Hempstead Video* (Opp. at 11); they follow from its holding that screens suffice only "in appropriate cases and on convincing facts." 409 F.3d at 138.

[3] Except as noted, all "Ex." cites are to the January 14, 2011 Klaus Declaration.

III. DEFENDANTS CANNOT EXPLAIN AWAY, OR SIMPLY IGNORE, THE RECORD [redacted] Willkie had a disabling conflict that could not be cured without Plaintiffs' informed consent.

A. [redacted]

[redacted] Defendants cannot have it both ways.

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[4] [redacted]

They cannot block inquiry concerning what the firm and Defendants discussed and then have their General Counsel offer his selective take on the subject. Defendants cannot use the privilege as shield and sword. *See United States v. Bilzerian*, 926 F.2d 1285, 1293-94 (2d Cir. 1991). [redacted]

B. [redacted]

[redacted] Plaintiffs demonstrated that Korn did not just have access to but lived and breathed Plaintiffs' confidential information for many months. Ex. D at 88:11-13; Pariser Decl. ¶¶ 3-5.

[redacted]

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5 [redacted]

[redacted]

C. [redacted]

[redacted] Korn indisputably received a broad array of confidential information while at Cravath, including information going to the core of the issues to be adjudicated at the upcoming trial. [redacted]

[redacted] The test instead is whether the current representation and Korn's former representation "are substantially related." *Chinese Automobile Distributors of America LLC v. Bricklin*, 2009 WL 47337, at *2 (S.D.N.Y. Jan. 8, 2009). Here, the two matters are not just "substantially related": *they are one and the same case*. "Client confidences are not so inert as to limit their usefulness to defined legal disciplines or practice areas. They are fungible, and once disclosed can be applied by an experienced *lawyer in ways too numerous to anticipate*[.]" *Fierro*, 2007 WL 4287707, at *8 (emphasis added). The "issues are different" argument fails, as do all of Defendants' efforts to distinguish the events of the fall 2008 from summer 2010.

IV. WILLKIE'S SCREENING MEASURES COULD NOT BE, AND HAVE NOT BEEN, EFFECTIVE TO REBUT THE PRESUMPTION OF SHARED CONFIDENCES

Defendants ultimately base their Opposition on the claimed effectiveness of Willkie's screening measures. Such measures could not be effective given the facts here [redacted]

A. [redacted]

[redacted]

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6 [redacted]

[redacted]

[redacted]

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[7] [redacted]

[redacted]

B. [redacted]

[redacted] To effectively rebut the presumption of shared confidences, the firm "*must immediately, and effectively*, screen that lawyer from any contact with any relevant cases, such that there can be no 'doubts as to the sufficiency of these preventive measures.'" *Panebianco v. First Unum Life Ins. Co.*, 2005 WL 975835, at *3 (S.D.N.Y. April 27, 2005) (emphasis added). The existence of only "modest screening in place," which is "actively undercut" by the firm's other efforts [redacted], cannot "eliminate the

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'unacceptable appearance of impropriety.'" *Id*.

[redacted]

[redacted]

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8 [redacted]

9 [redacted]

10 [redacted]

[redacted]

C. [redacted]

[redacted]

[redacted] In *Intelli-Check*, for example, the court found "effective" a firm-wide email sent "immediately" upon notice of the conflict to Kelley Drye's six

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[redacted]

offices, "to formally establish the screen," stating that the conflicted attorney "would not work on or be involved with the litigation" and "that no Kelley Drye personnel would discuss with or seek from [the attorney] information regarding the litigation." 2008 WL 4682433, at *2-3, 5. Likewise, in *Reilly* the court found a screen effective that instructed all of its "members to not discuss any of these matters" with the conflicted attorney. *Reilly v. Computer Assoc. Long-Term Disability Plan*, 423 F. Supp. 2d 5, 8 (E.D.N.Y. 2006).

[redacted]

D. [redacted]

[redacted]

[redacted] In *Cheng*, the firm submitted affidavits stating that the attorney "has not worked on the Cheng case, disclosed Cheng's confidences nor discussed the merits of the case while at the [] firm, and that the firm will not permit him to have any substantive involvement in the Cheng defense." 631 F.2d at 1057. Nonetheless, the Second Circuit held that "it is unclear to us how disclosures, admittedly inadvertent, can be prevented" where there is a "continuing danger that [the attorney] may unintentionally transmit information he gained through his prior association" in "his day-to-day contact with defense counsel." *Id.* at 1058. Numerous other courts have held similarly.[13]

Defendants ask the Court to ignore this authority because Willkie is a large firm with multiple offices. Opp. at 22. The case law, however, does not turn on the size of the firm, but rather the fact that "courts are concerned that the disqualified attorney," in his "day-to-day contact" with colleagues, "may unintentionally transmit information learned in the course of the prior representation." *Crudele*, 2001 WL 1033539, at *4. Thus, whether a "firm has 3 offices, with one soon to open" is "irrelevant" if the attorneys at issue "work in the same office" and

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[12] [redacted]

[13] *See Filippi*, 722 F. Supp. 2d at 307 (rejecting firm declarations that "everyone working at the [] Firm is aware that [the attorney] is not to have any participation in, or knowledge about, [the plaintiff's] case" given that court is not "able to determine whether the proposed or implemented screening measures will effectively prevent disclosure"); *Crudele v. New York City Police Department*, 2001 WL 1033539, at *3-4 (S.D.N.Y. Sept. 7, 2001) (rejecting averment that attorney "does not work on or discuss the . . . cases, has no access to the firm's print or electronic files and has only limited interaction with . . . the partner who handles those matters" where "degree of both past and present interaction between [lawyers] raises grave concerns about both the possibility of unintentional breaches of client confidences and about the appearance of impropriety such as to taint any trial in these actions"); *Uzzi*, 549 F. Supp. at 982, 984. *See also* Mot. at 20 n.13.

"interact" regularly. *Id.* *See also U.S. Filter Corp. v. Ionics, Inc.*, 189 F.R.D. 26, 30 (D. Mass. 1999) (concern over disclosure applies "not only in small firms, . . . but also in small practice groups within a large firm"). Moreover, the *Lime Wire* matter is hardly some ancillary, backwater case run by one or two Willkie lawyers [redacted] In *Reilly* (*see* Opp. at 15, 24), the court noted that unlike *Cheng* and its progeny, where "most or all the attorneys were located in the same physical office as the disqualified attorney," the conflicted attorney there "was located in a different office from all the attorneys in his department and most of the attorneys in the firm. . . . ***This physical separation is an important distinction because it substantially reduces the chances of inadvertent disclosure and strengthens the physical aspects of the screen***." 423 F. Supp. 2d at 11 (emphasis added).[14]

V. DEFENDANTS WENT INTO THE WILLKIE REPRESENTATION WITH THEIR EYES WIDE OPEN TO THE RISK OF DISQUALIFICATION

Defendants' protestations of prejudice are not well-taken. [redacted] *See also Cardona v. General*

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[14] In *Intelli-Check* (*see* Opp. at 13-14), the court focused on the "de facto separation" that existed between the conflicted attorney, who worked in the New York office, and Defendants' litigation team, who worked in the D.C. office, which made "inadvertent disclosures unlikely." 2008 WL 4682433, at *2, 5. Similarly, in *Hempstead Video,* the conflicted attorney had only a "limited relationship" with the firm. The conflicted attorney had been a solo practitioner "renting office space" from the firm. When he decided to "semi-retire' in his mid-70s, he proposed to turn several of his clients over to the firm and to become "of counsel." 409 F.3d at 130. Although the Second Circuit acknowledged "uncontradicted affidavits" submitted by the attorney and the firm, it put "special focus on [the conflicted attorney's] double role-of counsel to the [] firm only with regard to the cases he was turning over, while independent of the [] firm as to the matters he retained." *Id.* at 137-38.

Motors Corp., 942 F. Supp. 968, 978 (D.N.J. 1996) ("by proceeding in reckless disregard of the New Jersey Rules of Professional Conduct," firm must suffer "self-inflicted wound").

Defendants and Willkie have only themselves to blame for their predicament. Defendants were not obligated to hire Willkie, but consciously chose the firm notwithstanding the conflict and the fact that Plaintiffs might learn of it and object. Alternatively, Willkie could have disclosed the conflict to Plaintiffs last summer. *See* ABA Model R. 1.10(a)(2)(ii)). If Plaintiffs did not consent, and Defendants were intent on hiring Willkie, the matter could have been litigated at that time. *See Rembrandt Technologies, LP v. Comcast Corp*., 2007 WL 470631, at *4 (E.D. Tex. Feb. 8, 2007) (prejudice not "sufficient to overcome the grounds for disqualification" where "[m]uch of the prejudice might have been avoided had [firm] disclosed" conflict). [redacted] Defendants and Willkie have been on notice since December that Willkie might be disqualified. LeMoine Decl., Ex. 4 (12/17/2010 letter). Defendants cannot create prejudice by having their tainted counsel accelerate its litigation activities.

Moreover, any purported hardship to Defendants is not nearly as great as they contend. Defendants already have switched firms twice in the past year, and new counsel has been able to quickly engage themselves in the matter. Further, Willkie has only represented Defendants for a few months. This is not a case where the Court would "disrupt attorney-client relationships that have existed *for a substantial period of time*." *World Food Systems, Inc. v. Bid Holdings, Ltd.*, 2001 WL 246372, at *3 (S.D.N.Y. Mar. 12, 2001) (emphasis added). And, in all events, any hardship to Defendants has been completely self-inflicted.

VI. CONCLUSION

For these reasons, and those stated in Plaintiffs' Motion, Willkie should be disqualified.

Dated: January 31, 2011

Respectfully submitted

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